STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ROBIN SCOTT DUENAZ,

Defendant-Appellant.
_____/

Supreme Court No. 150286

Court of Appeals No. 311441

Circuit Court No. 12-000721FC

ST. CLAIR COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

CHRISTINE A. PAGAC (P67095)
Attorney for Defendant-Appellant

SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

BY: CHRISTINE A. PAGAC (P67095)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

Table Of Contents

Table Of Authorities

Cases

Constitutions And Statutes

Other Authorities

Statement Of Facts

Robin Scott Duenaz was convicted after a jury trial of three counts of criminal sexual conduct in the first degree (person under 13, defendant 17 years or older) and one count of criminal sexual conduct in the second degree (person under 13, defendant 17 years or older) in Saint Clair County Circuit Court, Judge James Adair presiding. The prosecution argued that Mr. Duenaz sexually assaulted Desiree Martin sometime between December 25, 2007 and January 1, 2008 while she was visiting her aunt, -- a friend of Mr. Duenaz. Trial did not occur until 2012 because Mr. Duenaz had moved to Arizona.

Desiree Martin was seven years old in 2007 and lived in Marlette with her mother Elizabeth Cumper. *TR 541, 543.*[1] Ms. Cumper sent Desiree to visit her sister and Desiree's aunt, Dawn Martin, in Port Huron during the 2007 - 2008 holiday break. *TR 544.* Dawn Martin had been acquainted with Mr. Duenaz for about three years and during the visit she allowed him to pick up Desiree and her own four year old daughter, Shaunna, to make cookies at the Red Pepper restaurant located beneath Mr. Duenaz' apartment. *TR 7, 546.* Dawn Martin recalled the girls returning with Mr. Duenaz several hours later with cookies and extra dough. *TR 418-421.* At the girls' request, she allowed another sleepover with Mr. Duenaz that week. And, on another day she allowed him to pick the girls up and take them to K-Mart. She recalled both Desiree and Shaunna going shopping with Mr. Duenaz and returning with bubble bath and toys. *TR 418-421.*

None of the adults in contact with Desiree noticed any change in her behavior or emotional state during her visit or in the 13 days that followed. Dawn Martin noticed absolutely no change in Desiree's emotional or physical state during the time period when Desiree was staying with her and

[1] There are four volumes of transcripts from the jury trial that are sequentially paged and will be cited herein collectively as "TR". Transcripts of the various pretrial hearings will be cited by their date, while the sentencing hearing will be cited as "ST".

recalled that she seemed perfectly normal. *TR 429, 432-433.* Nor did she notice any change in Mr. Duenaz' behavior whom she had known for several years, when he visited her home often during this Christmas break. *TR 418, 423.* Tara Groh, Desiree's adult cousin also lived with Dawn Martin during this time and had known Mr. Duenaz for several years. *TR 377, 401.* She noticed no change in Desiree during the time the abuse would have taken place and noticed no change in Mr. Duenaz's behavior during his frequent visits to Dawn's home over the Christmas break. *TR 382.* Elizabeth Cumper spoke with Desiree by telephone every day during the break and did not notice anything wrong. *TR 358, 375, 378-382.*

It was not until January 13, 2008; 13 days after Desiree returned to her mother, that there was any accusation against Mr. Duenaz. *TR 381.* Dawn Martin testified that on that day her daughter Shaunna told her something about Mr. Duenaz that led her to call the police and family members (presumably Elizabeth Cumper and Tara Groh). *TR 424, 426.* Ms. Groh testified that she called Ms. Cumper and Desiree to talk with them about what she had been told. *TR 381.* Ms. Cumper contacted police and took Desiree to the doctor at their direction. *TR 364, 381.*

Desiree was examined by two doctors regarding the allegations of sexual abuse; neither corroborated the allegations. Doctor Duane Penshorn, who examined Desiree about two weeks after the alleged incidents on January 13, found no physical evidence of sexual abuse. Doctor Harry Frederick examined Desiree Martin on January 22nd and did not find any evidence that could be exclusively linked to sexual abuse other than Desiree's verbal report. *TR 460, 488, 478.*

Before trial the defense filed a request pursuant to MCL 767.40a for assistance in procuring the appearance of Dr. Penshorn and Dr. Frederick for trial. *Motions 6/4/12 21, 30.* Rather than objecting as specified by the statute, the prosecutor denied Dr. Penshorn was a vital *defense* witness because he was listed on the prosecutor's witness list. *People's Answer to Motion to Compel Testimony of*

Duane Penshorn MD. And, rather than conducting a hearing as required by MCL 767.40a(5), the court simply reiterated that Dr. Penshorn was a prosecution witness and did not order the prosecutor to provide assistance in procuring him. *Motions 6/4/12*.

But on the eve of trial, the prosecution informed the court that Dr. Penshorn had relocated to Texas and as a result could not be present for trial. *Motions 6/4/12 32*. Defense counsel reminded the court of his motion for assistance in procuring this witness for trial. *Id.* at *30*. The court's response was simply to advise the prosecutor to make "appropriate and sincere efforts" to produce Dr. Penshorn, with the possibility that if such efforts could not bring him to trial, his medical report could be admitted at trial instead. *Id.* at *33*.

The defense also learned that Desiree's step-father, Richard Bloomfield, pled guilty to two counts of criminal sexual conduct 3rd degree and one count of criminal sexual conduct 2nd degree for sexually assaulting Desiree just a year before the allegations against Mr. Duenaz. Defense counsel moved to present this evidence at trial. The judge stated that he would conduct an in camera review comparing the police reports from both cases in order to determine whether the allegations and language used were similar. Following the in camera review, the motion was denied. A motion to receive a copy of the medical record from the doctor's examination of Desiree Martin in that case was also denied flatly and without reason. *Motions 4/18/12*. Then on the first day of trial during voir dire, the court ruled that evidence of Bloomfield's prior sexual assaults on Desiree were inadmissible under the Rape Shield Statute. *TR 156-161*.

At trial, Desiree testified that she and her cousin Shaunna never baked cookies with Mr. Duenaz when they went to his apartment during Christmas break. *TR 570*. Instead, when they got to Mr. Duenaz' apartment, he had them take a bath and took their clothing to wash it. *TR 547*. He gave t-shirts to the girls to put on once they were out of the bath and the three of them lay down on

a bed in his room to watch television. *TR 548,* 550. At some point Shaunna fell asleep and Mr. Duenaz moved next to Desiree in the bed and "his penis went into [her] butt." *TR 550, 551.* He then moved Desiree to another bed, where he "put his penis in [her] vagina." *TR 552.* Mr. Duenaz then gave her some money and took her back to her aunt's. *TR 555.*

On another day during the break, Mr. Duenaz picked Desiree up from her Aunt Dawn's, took her back to his apartment where he put his penis in her vagina again, gave her some money, took her to the store alone to get "two bags of chips and a lot of gum", and then took her back to her Aunt Dawn's house. *TR 556, 557, 560.*

Ms. Cumper testified that she heard nothing about any abuse until Desiree had been back home for 13 days, at which point she received a call from Tara Groh. And while Desiree had previously been a "quiet and compelling child she began to have frequent angry outbursts, broke out in pimples, and became withdrawn, following the allegations. *TR 368, 371-372.*

Despite a defense motion to prevent the prosecutor from presenting bad acts testimony from witness Aaron Cartwright, Duenaz' former step-daughter, she was allowed to testify during trial. *Motions 4/18/12* 36-38. Ms. Cartwright testified that she had never liked Mr. Duenaz and wished that her mother had never married him. *TR 616.* She also testified that Mr. Duenaz had forcibly sexually penetrated her in July of 2007 when she was 13 years old. *TR 588, 590, 594, 597.* At the time of trial in this case, charges were pending against Mr. Duenaz for his alleged victimization of Ms. Cartwright. Over defense objection, the court also admitted Mr. Duenaz's 2007 conviction for attempted child molestation from Arizona. No details underlying that conviction were provided either in the offer of proof or as evidence at trial. *Trial 6/7/12, 670.*

Dr. Frederick was present for trial and testified that when he examined Desiree on January 22nd he noted some redness on her external genitalia and some urine leakage from her urethra. *TR*

465-466. The prosecutor specifically asked whether such leakage could be indicative of sexual abuse, to which the doctor referenced one study showing a higher rate of leakage in children who had been sexually abused. *TR 469*. Doctor Frederick also testified that damage to the genital tissues is less commonly seen 7-14 days from the date of sexual contact due to genital tissues healing quickly and that 10-14 days from the date of the trauma could be considered remote in time. He admitted under cross, however that while the hymen could sometimes heal there were generally signs that injury had occurred. *TR 467, 469, 475*.

By the time Dr. Frederick concluded his testimony on the second day of trial, the prosecutor informed the court that she was still unable to secure the presence of Dr. Penshorn (who had also examined Desiree and found no signs of sexual abuse). The record reflects she suggested that Dr. Penshorn's testimony be taken by telephone. *TR 501-512*. Defense counsel argued that the physical presence of Dr. Penshorn was preferable but that in lieu of that telephone testimony was agreeable because the testimony was so important to the defense because Dr. Penshorn had examined Desiree within 14 days of the alleged incident, the prosecutor changed her position. In response, the prosecutor objected to the telephonic testimony, arguing that only two-way video testimony was allowed by MCR 6.006, and only then if both parties consent. Ultimately, the court agreed with the prosecutor and ruled that because the court was not properly equipped for such a presentation Dr. Penshorn could not testify. Defense counsel stipulated that, given the court's ruling in the matter, a copy of Dr. Penshorn's report be admitted. *TR 501-512*. *People's Exhibit 3*.

The jury convicted Mr. Duenaz of three counts of criminal sexual conduct in the first degree (person under 13, defendant 17 years or older) and one count of criminal sexual conduct in the second degree (person under 13, defendant 17 years or older).

At sentencing the trial court assessed fifty points for offense variable 11 and sentenced Mr. Duenaz to a prison term of 50-75 years. *Judgment of Sentence; ST.*

Mr. Duenaz appealed of right arguing, *inter alia,* that the trial court erred in admitting Desiree Martin's hearsay statements to Dr. Frederik, in excluding evidence of the prior sexual abuse of Desiree by her stepfather, in admitting evidence of prior allegations of and convictions for, sexual assault crimes, in refusing to permit Dr. Penshorn to testify telephonically, and in increasing his sentence range based on judge found facts in violation of *Alleyne v United States*, 133 S Ct 2151 (2013). *People v Duenaz,* Court of Appeals No. 311441.

In a published opinion on July 10, 2014, the Court of Appeals rejected these challenges and affirmed Mr. Duenaz's convictions, but remanded for resentencing based on an error in scoring 50 points for OV 11.

Argument

I. Evidence That The Complainant Was Previously The Victim Of Sexual Abuse Is Not Evidence Of "Sexual Conduct" Within The Meaning Of MCL 750.520J

This Court has asked for supplemental briefing on the issue of whether evidence of a child's prior sexual abuse is "sexual conduct" excluded by MCL 750.520j. The short answer to that question is "no."

MCL 750.520j was enacted as part of a comprehensive revision to modernize the rape statute in 1974, and it has not been amended. Before the passage of rape-shield laws, "opinion and reputation evidence of a victim's consensual sexual activity had long been deemed probative of the likelihood of a woman's consent with a defendant and her credibility for truthfulness." *People v LaLone,* 432 Mich 103, 123 (1989).

The purpose behind Michigan's rape shield statute was explained in *People v Adair*, 452 Mich 473, 480-481 (1996):

> The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying "because they knew their private lives [would] be cross-examined." House Legislative Analysis, SB 1207, July 18, 1974.

See also People v Arenda, 416 Mich 1, 9 (1982) ("In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.")

"T]his Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature." *Shinholster v Annapolis Hosp,* 471 Mich 540 (2004). The Court does so first by reference to the language of the statute. MCL 750.520j states:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

As Justice Markman observed in *People v Parks*, 483 Mich 1040, 1060 (2009) (Markman J, dissenting) the definition of "conduct" is similar throughout dictionaries. A review of all of these definitions makes it clear that conduct requires some sort of action. *See Anglers of the AuSable, Inc v Dept of Envtl Quality,* 488 Mich 69, 125; 793 NW2d 596, 627 (2010) opinion vacated on reh sub nom. *Anglers of AuSable, Inc v Dept of Envtl Quality,* 489 Mich 884; 796 NW2d 240 (2011) (Young, J, dissenting)(interpreting phrase "defendant's conduct" in MCL 324.1703 using "the act, manner, or process of carrying on[.]" as definition of conduct)

- The authoritative Oxford English Dictionary defines the noun, "conduct" most relevantly as "6. The action or manner of conducting, directing, managing, or carrying on (any business, performance, process, course, etc)." or "8. A. "Manner of conducting oneself or one's life; behavior; usually with more or less reference to its moral quality (good or bad). (Now the leading sense)." OED 2d Ed. (1989).
- Webster's Third New International Dictionary (1961) offers similar definitions: "2 a: the act, manner, or process of carrying out (as a task) or carrying forward" and also "3 c: a mode or standard of personal behavior esp. as based on moral principles – sometimes distinguished from *behavior* (animals . . . do not rise from behavior to ~ -- J.S. Clarke)"

- In *People v Parks,* Justice Young cited the Random House Webster's College Dictionary (1997) definition of conduct as "personal behavior." 483 Mich 1040, 1044 (2009) (Young, J, concurring).
- Also in *People v Parks,* Justice Markman cited several definitions of "conduct": "personal behavior; way of acting; deportment," Random House Webster's College Dictionary (1997); "[t]he way a person acts; behavior," The American Heritage Dictionary of the English Language (1981); and "[t]he manner of guiding or carrying one's self; personal deportment; mode of action; behavior," Webster's Revised Unabridged Dictionary (1996). 483 Mich 1040, 1060 (2009) (Markman, J, dissenting)
- The Random House Dictionary of the English Language (Second Edition 1987) defines "conduct" as "personal behavior; way of acting; bearing or deportment."
- Merriam-Webster's Collegiate Dictionary (10th Ed) defines "conduct" as "2: the act, manner, or process of carrying on: MANAGEMENT" and "3. A mode or standard of personal behavior esp. as based on moral principles."
- The Merriam-Webster online dictionary defines "conduct" as "the way that a person behaves in a particular place or situation…the act, manner, or process of carrying on … or alternatively, conduct is a mode or standard of personal behavior especially as based on moral principles". www.merriam-webster.com/dictionary/conduct.

The statutory language also must be read and understood in its grammatical context, unless it is clear that something different was intended. *Bush v Shabahang,* 484 Mich 156, 167 (2009). Read in the context of the sentence, "conduct" means actions a person has chosen to take, not the physical consequences of succumbing to an attack. The provision excludes not only evidence of the complainant's "sexual conduct" but also opinion and reputation evidence about that "sexual

conduct." It makes little sense to forbid "opinion" and "reputation" evidence about a complainant being the victim of a crime, i.e. "He has a reputation in the community for being robbed."

Defining conduct as the complainant's own actions exercised by her own choice, as opposed to including as her "conduct" the physical consequences of acts of violence by an assailant upon her, is not only consistent with the dictionary definitions, it is consistent with the purpose of the rape-shield statute. The statute was designed to empower women (and other victims of sexual assaults) to come forward without fear that they would be "blamed" for their victimization, viewed as not credible because of a lack of chastity. "The evolution of societal attitudes deeming sexuality as distinct from crimes of sexual violence fostered dissatisfaction with archaic evidentiary rules which freely accorded a woman's sexual decisions relevancy within a prosecution for rape." *LaLone,* 432 Mich at 124. This change led to, among other things, the rape-shield provisions. *Id.* Holding that an instance of sexual abuse is the complainant's "sexual conduct" within the meaning of the rape-shield law reunites, rather than separates, sexual violence from sexuality. It reflects societal attitudes that were archaic in 1974, let alone in 2015.

This reading of the rape-shield statute finds support by analysis of other sections of the same chapter of the Michigan penal code that address sexual conduct. *Parks*, 483 Mich at 1061 (Markman, J. dissenting). Statutes that relate to the same or related matter are considered to be *in pari material* and must be read together and as a whole. *People v Perryman*, 432 Mich 235, 240 (1989); *People v Harper*, 479 Mich 599, 621 (2007). The general rule of i*n pari materia* requires courts to examine a statute in context and read similar statutory terms so that they are given harmonious meaning between related statutes. *Id.*; *Jennings v Southwood*, 446 Mich 125, 136 (1994). Here, under MCL 750.520b through 750.520e a person is guilty of "criminal sexual conduct" of varying degrees

if that person engages in sexual penetration or sexual contact with another person when certain aggravating factors are present.

Finally, counsel acknowledges that the majority of states have interpreted their versions of the rape-shield statutes to include non-consensual activity. *See People v Parks,* 483 Mich at 1047, n 23 & 24 (2009) (Young, J, concurring (collecting cases)). For the reasons articulated above, this Court should nonetheless interpret "sexual conduct" of the victim to exclude instances in which the complainant was the victim of sexual abuse.

II. Evidence Of Prior Sexual Abuse Is Admissible To Preserve The Defendant's Right Of Confrontation And To Present A Defense

This Court has also asked whether, regardless of whether the evidence of prior sexual abuse is considered to be "sexual conduct," if the evidence is nevertheless admissible in this instance to preserve the defendant's right of confrontation and to present a defense (see *People v Hackett,* 421 Mich 338 (1984)). The short answer to this question is yes.

The Sixth Amendment of the United States Constitution guarantees the right of confrontation and cross-examination as a fundamental requirement of a fair criminal trial. US Const, Amend VI; *Crawford v Washington* 541 US 36 (2004); *Sheppard v Maxwell*, 384 US 333, 351 (1966). The Michigan Constitution provides similar protection. Mich Const 1963, Art 1, § 20; *People v Fackelman*, 489 Mich 515 (2011).

A criminal defendant also has a constitutional right to present a defense under US Const, Ams V, VII, XIV; Const 1963, art 1, § 17. *Chambers v Mississippi*, 410 US 284, 294 (1973); *People v Carpenter*, 464 Mich 223, 241-242 (2001). This right is fundamental to due process. "[T]he right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies" is in fact at the very heart of the due process right. *Washington v Texas,* 388 US 14, 19 (1967). If state evidentiary rules, including Michigan's rape shield statute, interfere with a defendant's constitutional right to present a defense or confront accusers, they must yield. *Michigan v Lucas*, 500 US 145 (1991) (recognizing that, rather than adopting per se rule for precluding evidence under rape shield statute, state courts must determine, on case-by-case basis, whether exclusionary rule "is 'arbitrary or disproportionate' to the State's legitimate interests.")

The U.S. Supreme Court has more than once determined that the Constitution permits a defendant to defend himself despite the fact that the line of inquiry may be uncomfortable for the testifying witness. In *Davis v Alaska*, 415 US 308, 320 (1974), the trial court had excluded evidence

that a witness had been on probation as the result of a juvenile defense, evidence which the defendant had sought to introduce to show that the witness had a motivation to lie (out of fear that the police might act to revoke his probation). The evidence was excluded pursuant to a state statute. Holding that the limitation on the defendant's right to cross-examine the crucial witness violated the right to present a defense, the Court explained: "we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself." *Id* at 320.

In keeping with this line of authority, this Court has previously held that evidence otherwise excluded by the rape-shield statue "may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Hackett,* 421 Mich at 348. In *Arenda, supra*, the defendant challenged the constitutionality of the rape-shield statute and sought to introduce "possible" evidence of the "prior sexual conduct" of the 8-year old complainant to rebut what was then novel but is now fairly commonly referred to as the "sexual innocence inference theory." In upholding the constitutionality of the statute, and affirming the conviction, the *Arenda* court said, "we are persuaded that the prohibitions in the rape-shield law will not deny a defendant's right of confrontation in the overwhelming majority of cases and, in particular, not in this case. If such a set of facts arises as to place in question the constitutional application of the rape-shield law, it can be addressed." *Arenda,* 416 Mich at 13.

The majority of the cases addressing the question of whether the exclusion of evidence that a child was previously raped violates the Constitution have concluded that it does. When the evidence is being offered to show alternative explanations for physical or emotional injuries federal courts have held that the exclusion of such evidence is disproportionate to the ends the rape-shield laws are designed to serve and violate the Constitution. *Grant v Demskie*, 75 FSupp2d 201 (SDNY

1999)("*E.g., Tague v. Richards,* 3 F.3d 1133, 1139 (7th Cir.1993) (defendant should have been allowed to present evidence that the eleven year old victim was previously raped by her father, to advance an alternate theory of why the child's hymen was enlarged and how she got a sexually transmitted disease); *United States v. Bear Stops,* 997 F.2d 451, 457 (8th Cir.1993) (en banc) (district court improperly limited the defense's proffer that three boys raped the child complainant before the defendant allegedly attacked the child, which could have provided an alternative explanation for the child's exhibition of sexual abuse symptoms); *United States v. Begay,* 937 F.2d 515, 519–23 (10th Cir.1991) (error to exclude evidence of child's prior rape as alternative theory of how child's hymen came to be injured); *Latzer v. Abrams,* 602 F.Supp. 1314, 1319–21 (E.D.N.Y.1985) (habeas petitioner was denied his Sixth Amendment right to cross-examine the child complainant and his brother with respect to their sexual relations with other men to establish that the brothers misidentified the accused, where the trial court did not hold a hearing to inquire into the relevance of the brothers' prior sexual conduct).")

State courts have also addressed the "sexual innocence inference theory," with "the vast majority" of states also allowing the admission of prior assaults under this theory. *State v Molen*, 148 Idaho 950, 954 (2010). The states have not adopted a uniform approach. The most permissive approach is exemplified by Maine, in *State v Jacques*, 558 A2d 706 (Me 1989). The complainants in that case were 5 and 10, and the Maine Supreme Court held: "Where the victim is a child, as in this case, the lack of sexual experience is automatically in the case without specific action by the prosecutor. A defendant therefore must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge." *Id.* at 708.

Other courts have excluded evidence of prior assaults offered to rebut an inference of "sexual innocence" where the child complainant is older, generally a teenager, on the basis that the

jury is not going to presume they are unfamiliar with sex. *See Montgomery v. Commonwealth,* 320 SW3d 28, 43 (Ky 2010)(evidence properly excluded, in part, because the victim was fourteen years old when she made her first detailed allegations of sexual abuse) In contrast, in *Pierson v People,* 279 P3d 1217, 1224 (Colo 2012), the Colorado Supreme Court excluded the evidence on relevance grounds where the complainant was only 8 years old. The dissent in *Pierson* noted: "The majority's reasoning is at odds with decisions from other jurisdictions. *People v. Morse,* 231 Mich.App. 424, 586 N.W.2d 555, 555 (1998) (holding that the rape shield statute did not bar evidence of prior sexual assault on the victim because "if the jury is not allowed to learn of the [prior sexual] offenses against [the child-victim], then the jury will inevitably conclude that the [child-victim's] highly age-inappropriate sexual knowledge could only come from defendant having committed such acts" (emphasis original)); *see also LaJoie v. Thompson,* 217 F.3d 663 (9th Cir.2000) (same); *State v. Pulizzano,* 155 Wis.2d 633, 456 N.W.2d 325 (1990) (same); *State v. Rolon,* 257 Conn. 156, 777 A.2d 604 (2001) (same); *State v. Lujan,* 192 Ariz. 448, 967 P.2d 123 (1998) (same); *People v. Hill,* 289 Ill.App.3d 859, 225 Ill.Dec. 244, 683 N.E.2d 188 (1997) (same); *State v. Warren,* 711 A.2d 851 (Me.1998) (same); *State v. Budis,* 125 N.J. 519, 593 A.2d 784 (1991) (same); *State v. Grovenstein,* 340 S.C. 210, 530 S.E.2d 406 (S.C.App.2000) (same); *Commonwealth v. Ruffen,* 399 Mass. 811, 507 N.E.2d 684 (1987) (same); *Summitt v. State,* 101 Nev. 159, 697 P.2d 1374 (1985); *State v. Baker,* 127 N.H. 801, 508 A.2d 1059 (1986) (same); *People v. Ruiz,* 71 A.D.2d 569, 418 N.Y.S.2d 402 (N.Y.Sup.Ct.1979) (same); *Grant v. Demskie,* 75 F.Supp.2d 201 (S.D.N.Y.1999) (same)." *Pierson, supra,* 279 P3d at 1224 (Bender, J, dissenting)

A position that has been called a compromise view is one adopted by the Wisconsin Supreme Court in *People v Pulizzano,* 135 Wis2d 633 (1990) and cited approvingly by several courts. *Eg, Grant v Demskie, supra.* This balancing test requires the defendant to first establish his or her constitutional rights to present the proposed evidence through a sufficient offer of proof. *Id.* at 648–

49. A sufficient offer of proof must meet five tests: "(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect." *Id.* at 656. Once that has happened, then the court weighs the right to present the evidence against the State's interest in excluding it. *Id. See also*, eg, *State v Oliver*, 158 Ariz 22 (1988)(adopting two prong approach); *State v Budis*, 125 NJ 519 (1991). Such a test is broad enough to encompass not just for "sexual innocence" purposes, but also for alternate explanations of physical and emotional injury.

The Constitution supports the adoption of the most permissive test for admission. The Supreme Court has consistently characterized Sixth Amendment guarantees in strong terms: "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers, supra,* 410 US at 294. But even when analyzed under a "compromise" test, the exclusion of the evidence of the prior assault in this case deprived Mr. Duenaz of his parallel rights to confrontation and to present a defense.

It is undisputed that the prior sexual assaults by Richard Bloomfield resulted in convictions of two counts of criminal sexual conduct third-degree and one count of criminal sexual conduct second-degree. Evidence from the Bloomfield case depicts similar charges and an alternative explanation for complainant's emotional outbursts, urine leakage, and advanced sexual knowledge. Desiree testified that Mr. Duenaz' penis "went into her butt" and that he "put his penis in [her] vagina". *TR 550-552.* According to the police report in that case, Bloomfield penetrated Desiree Martin's vagina and anus multiple times from the time she was five years old until she was six years old. The evidence of this prior assault was relevant to material issues in this case: whether there

were alternative explanations for any physical or emotional results of the alleged assaults and to rebut an inference of "sexual innocence" in such a young girl.

Turning first to the alternative source explanation, evidence of two physical/emotional effects of the alleged abuse were presented to the jury. Desiree's mother testified that she had gone from being a well-behaved child to one who suffered from frequent outbursts, had to see the school counselor, and was breaking out in pimples everywhere following the disclosure. *TR 371-372, 368.* The prosecution sought to link that behavior and the physical symptoms to Mr. Duenaz, implying the symptoms corroborated Desiree's claim that Mr. Duenaz abused her. *TR 465, 468-69.* In addition, Dr. Frederick testified that he saw a condition of urine leakage upon examining Desiree. *TR 465, 468-69.* And while he saw it as less than significant, the prosecutor elicited testimony that one report linked such physical condition with sexual abuse. *Id.* The police reports from the prior case reveal similar observations of the complainant's physical and emotional state. Thus, the evidence of the prior assault was relevant to provide alternate explanations for why she exhibited these symptoms. The exclusion of the evidence deprived Mr. Duenaz of his right to present a defense and to cross-examine these witnesses.

Additionally, given Desiree's age at the time of the initial report, the evidence of the prior assault was relevant and admissible to show an alternate source of Desiree's age-inappropriate knowledge of sexual activity. The jury was called upon to make determinations about not only Desiree's reliability but about where she would have learned of sex acts involving vaginal and anal penetration and acquired language to describe those acts at eight years old, and then repeated them four years later. Desiree used vernacular that described sexual acts that a child of her age could not reasonably have been expected to know unless exposed to it directly. For example, Dr. Frederick testified that when she was eight years old, Desiree Martin told him, "Scott put his pee-pee in her

…butt and private part..." *TR 458.* And at trial Desiree testified regarding Duenaz that "his penis went into [her] butt." *TR 550, 551.* And, that he "put his penis in [her] vagina." *TR 552.* Where prior sexual assaults could explain the source of such knowledge, it is far "less probable" that the sexual knowledge came from interactions with Mr. Duenaz and the evidence is relevant.

Desiree's credibility – or more accurately her reliability – was central and critical to this case and the improperly excluded prior abuse evidence went to the core of that reliability. Further, it was relevant to rebut evidence that supposedly corroborated her testimony.

Nor was evidence of Mr. Bloomfield's sexual abuse unduly inflammable or prejudicial under MCL 750.520j(1) or MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford,* 458 Mich 376, 398 (1998). The probative value of the evidence at issue outweighs any danger of prejudice from the mere fact that a complainant has been previously sexually assaulted. If the defense had been allowed to reference the prior abuse the jury would have heard that the defendant in that case pled guilty to the crimes of which he was accused by Desiree Martin, thus lessening privacy concerns. Surely no reasonable juror would be inclined to view Desiree negatively because of the prior abuse. The danger of unfair prejudice is thus minimal.

For these reasons, the exclusion of the evidence of the prior assault violated Mr. Duenaz's rights to confrontation and to present a defense.

III. The Prosecution Cannot Meet Its Burden To Prove That The Erroneous Exclusion Of This Evidence Was Harmless Beyond A Reasonable Doubt

The final issue this Court sought supplemental briefing on is whether the exclusion of the evidence in this case was harmless. This Court should conclude that the prosecutor has not met its burden of showing that the trial court's error was harmless. Trial counsel sought the introduction of this evidence on grounds that included both the right to confrontation and to present a defense. (4/8/12 Tr at 13; Defendant's "Memorandum Brief – Rape-Shield Law" dated 4/5/12) Preserved constitutional error requires this Court to reverse unless the prosecution can prove beyond a reasonable doubt that the error did not contribute to the verdict. *People v Carines*, 460 Mich 750, 774 (1999).

By excluding the evidence of the prior assault, trial counsel was unable to effectively cross-examine witnesses about Desiree's post-disclosure emotional problems and urine leakage. The prosecutor then used the physical and emotional signs of abuse to corroborate and thereby bolster Desiree's accusation against Mr. Duenaz. *TR 469, 368, 371-372*. In addition, despite her tender years, Desiree used vernacular that described sexual acts that a child of her age could not reasonably have been expected to know unless exposed to them directly.

The trial court's ruling prevented the defense from showing and arguing a perfectly plausible alternative – that Desiree Martin was not traumatized because she was sexually abused by Mr. Duenaz but instead was traumatized by the mere thought of having to endure medical examinations, psychological interviews, and legal processes again. This would explain why according to the all of the adults around her, her emotional and physical state were perfectly fine during and immediately following the time period when the alleged abuse would have taken place but changed once she was confronted with the questions from family members. It also would explain her otherwise precocious

sexual knowledge came about as a result of a prior assault, not an assault by Mr. Duenaz. The loosely linked urine leakage could also be explained by the prior assault.

Once an alternate source is offered for complainant's behavior and knowledge, the playing field would be leveled and the jury could accurately evaluate Desiree's testimony and that of her mother and Dr. Frederick. The only other evidence against Mr. Duenaz was that of his 2007 conviction for attempted child molestation in Arizona and the accusation of his former stepdaughter. While these accusations could have been considered by the jury, they do not prove that the accusations in this case are true. The jury was not given an opportunity to consider the crucial testimony of the complaining witness in light of evidence that showed that there were reasons other than Mr. Duenaz's guilt for her knowledge, her behavior and the physical symptoms. The error cannot have been said to be harmless beyond a reasonable doubt and reversal is required.

Conclusion

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, or issue any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Christine A. Pagac
_____

CHRISTINE A. PAGAC (P67095)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: July 29, 2015